IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.24 OF 1998

Damodar S. Mudaliar .. Petitioner

Versus

State of Maharashtra & Ors. .. Respondents

Mr.Anil C. Singh for petitioner

Mr.N.P.Deshpande, A.G.P. for respondent Nos. 1 to 3.

CORAM : A.P.SHAH AND

S.C.DHARMADHIKARI, JJ.

DATE : 4TH OCTOBER 2004.

ORAL JUDGEMENT (Per Dharmadhikari, J):-

1. The present petition impugns the action of respondents preventing the petitioner from playing music and having a dance performance in his Hotel premises. The request is that communication in this behalf of Malad Police

Station, Mumbai dated 28th December 1997 be quashed and set aside.

2. Petitioner is managing a restaurant by name "My Home Restaurant and Bar" situate at S.V.Road, Malad (West). According to him this restaurant is a place of entertainment as defined under section 2(10) of Bombay Police Act, 1951. He contends that police licence for conducting restaurant business has been issued in his favour under section 33(1)(w) and (y) of Bombay Police Act, 1951.

3. He contends that a licence has also been issued by Excise department under Bombay Prohibition Act, 1949 for sale of liquor. Petitioner possesses other licences including one from the Health Department. However, according to him, respondents are insisting for procurement of one more licence for the purposes of an ancilliary activity in the said hotel premises viz, playing of music band and occasional dance on recorded music and/or classical dance on recorded music. He submits that dominant or main activity is to provide food and drinks to

customers at the restaurant premises. He submits that people enter the restaurant solely for the purpose of eating food and drinks the aforesaid ancilliary activity is not charged nor any fee is levied or collected. There is no difference in the food items supplied at the hotel premises. Therefore, insistence of the authorities on separate licence insofar as this ancilliary activity is concerned is wholly illegal.

4. Shri Singh, Learned Counsel appearing in support reiterates these contentions and relies upon a decision of learned Single Judge of this Court reported in 1993 Mh.L.J. 1750. He contends that it has been followed subsequently by this Court. He submits that the law laid down in this decision is upheld in a decision of Supreme Court in Civil Appeal No.1862, 1864, 1865, 1866, 1867-1868 of 2000 3966/99, 1860, 1859, 1861 of 2000 and 2498 of 2001 and Writ Petition Nos.200, 201, 202 and 412 of 1999 delivered on 28th November 2002.

5. On the other hand, Shri Deshpande, learned A.G.P. submits that the contentions of

Shri Singh are thoroughly misconceived and untenable. He submits that these submissions overlook the concept of place of "*Public amusement*" and place of "*Public entertainment*" defined in Section 2(9) and (10) of Bombay Police Act. He submits that whenever it appears to authorities that the place is put to either use they can insist upon a licence in respect thereof. He submits that power to control both places is conferred by the Act. The power is not questioned nor can it be questioned and challenged. He submits that in exercise of this power, the Government has framed rules entitled "*Rules for Licensing and Controlling Place of Public Amusement (other than cinemas) and Performancer for Public Amusement, inluding Melas and Tamashas, 1960*. He submits that the submissions of Shri Singh overlook these rules and more particularly the object and purpose thereof. He submits that the view taken by this Court (1993 Mh.L.J.1750) (supra) is that a restaurant, which is admittedly a place of public entertainment and which has already taken out a licence as required under the Act and the Rules, cannot be called upon to obtain further licence

for maintaining a place of public amusement, simply because music is played therein. It is necessary to show that admission of public to such place is on payment of money or with an intention to collect it from those who are admitted. He submits that this view is based upon Rule 21 as it stood then, when this decision was rendered. After the Rules have been amended the law laid down in this decision will not apply. He submits that in any event an appeal was filed against the aforesaid decision of the learned Single Judge and this Court by an order dated 8th March 1995 declared that the said decision is no more good law in view of the amended Rule 21. He submits that by a further notification published in Government gazettee dated 19th September 2001, Rule 16A was amended by inserting the words "However no amusement in any form like dance, play, performance, recorded dance, mimicry, whether on fee or free of cost, shall be allowed to perform under this license." He submits that based on the above amendments, learned Single Judges of this Court have passed orders from time to time holding that no amusement in any form like dance, play,

performance of recorded dance or mimicry whether on fee or free of cost shall be allowed under the licence as obtained.

6. Insofar as the decision of the Supreme Court is concerned, Shri Deshpande submits that before the Supreme Court it was conceded that under the relevant rules prevailing in the State of Karnataka provisions have been made only in respect of public amusement. Therefore, the premises of the Appellants before the Supreme Court being place of public entertainment cannot be brought under their purview. He submits that this decision is distinguishable. On the other hand he submits that the law laid down in the decision of the Supreme Court reported in (1994) 5 S.C.C. 690 would apply to the present case. He submits that in the case in hand, rules have been made for both purposes. Rule cover both aspects viz., amusement and entertainment.

7. We find much substance in the contentions of Shri Deshpande. Bombay Police Act, 1951 is an Act to consolidate and amend the law for the regulation of the police force in the State of

Bombay. Definitions appear in Section 2. Definitions with which we are concerned are section 2(5)(A) "*eating house*", Section 2(9) "*place of public amusement*" and section 2(10) "*place of public entertainment*". Section 33 falling in Chapter IV empowers the authorities named in sub-section (1) thereof to make, alter or rescind rules or orders not inconsistent with the Act.

8. It has been made obligatory for all persons concerned to conform to any order duly made as long as the same is in operation. In exercise of the powers referred to above and by a notification published in the then Bombay Government Gazette, Rules for licensing and controlling places of public amusement (other than Cinemas) and Performances for Public Amusement, including Melas and Tamasha's have been framed by the authorities. Chapter I entitled "Preliminary" sets out that these rules, save as expressly provided othewise, apply to and in relation to All places of public amusement (other than cinemas) and to musical, dancing, mimetic, theatrical or other performances for

public amusement, including Melas and Tamashas, in Greater Bombay. The said Rules define the term "premises" in Rule 2(i). Chapter II thereof talks of no objection certificate. In this case, we are concerned with Chapter VIII of the Rules entitled "Premises License". No premises shall be opened or allowed to remain open for use as a place of public amusement unless person being owner, tenant, or occupier thereof shall have obtained a premises license therefor. The procedure for obtaining premises license has been set out in this chapter. Chapter IX entitled "Performance License" states that no person shall hold musical dancing, dramatic, mimetic, theatrical or other performance for public amusement inluding Melas and Tamashas or any public exhibition or diversion or game, by whatever name called, unless and until he has obtained a performance license from the Licensing Authority to hold such performance. Thereafter, procedure for obtaining such license is set out in this chapter. It is clear that other set of rules, viz., Rules for Keeping Place of Public Entertainment in Greater Bombay, 1953 are also in force. After the decision of the Division Bench

in Hotel Deepa's case (supra), Rule 21 of the 1953 Rules has been substituted by Amendment Rules entitled "Keeping Place of Public Entertainment in Greater Bombay (Amendment) Rules, 1994. Rule 21 reads thus:-

> "21. No person Keeping Places of Public Entertainment shall hold Musical dancing, Dramatic, Memetic, Theatrical or other performances for Public Amusement including Melas and Tamashas or any public exhibition or diversion or game unless he has obtained a Performance Licence from the Licensing Authority to hold such performances under Rule 116 of the Rules for Licensing and Controlling Places of Public Amusement (Other than Cinemas) and Performances for Public Amusement, including Melas and Tamashas, 1960".

9. Bare reading of this provision makes it abudantly clear that any person keeping place of public entertainment shall not hold the activities mentioned in this Rule unless he has

obtained performance license from the licensing authority to hold such performance under Rule 116 of 1960 Rules. Our attention is also invited to the further amendment to these Rules in 1999. In Rule 16A of the principal Rules, following was inserted:-

> " However no amusement in any form like dance, play, performance, recorded dance, mimicry, whether on fee or free of cost, shall be allowed to perform under this licence"

10. It is in this backdrop that the submissions of petitioner have to be appreciated. The authorities invited attention of the petitioner to the fact that he is issued a license to keep a place for public entertainment. However, it is noticed that the petitioner has been having performance of dance to the tune of recorded music. This, acording to authorities, contravenes the rules and conditions of licence. Petitioner has been cautioned by the authorities to have only such performances which are permitted by law.

11. Petitioner contends that new Rule 21 and Rule 116 postulate that a person holding performance for public amusement is required to obtain a performance licence from the licensing authority. He submits that performance license becomes necessary in respect of a programme which is a principal attraction and not one where it is ancilliary. In other words, if the programme is not carried out with a view to attract customers in the restaurant no performance licence is necessary. He submits that dominant activity of the people who enter the restaurant is eating food and not viewing the programme which is carried on for a short time. Therefore, rules for keeping a place for public amusement are not attracted. All the submissions are based on the footing that the law laid down in Hotel Deepa's case is still valid. As stated above, we are unable to accept these contentions. After the decision of Division Bench and Amendment to Rules this is not a good law.

12. In our view, on the strength of the

licence granted in petitioner's favour (Exh.A) he is not permitted to have performance of dance on recorded music unless he obtains licence in consonance with amended Rule 21. A plain reading of Rule 21 demonstrates that it applies to a person keeping place of public entertainment. It is not disputed by the petitioner nor could it be disputed by him that the licence granted to him is for public entertainment. The word "Public entertainment" as defined in the Act includes eating house. The term "eating house" as defined in section 2(5) may not include a place of public entertainment but place of public entertainment having been independently and distinctly defined to include a eating house, then, to our mind, the petitioner is bound by amended Rule 21. The learned Single Judge was concerned with a Rule which did not contemplate taking out a licence for maintaining place of public amusement simply because music is played, at a place like restaurant which is a place of public entertainment. After the decision of this Court it has been made incumbent upon persons keeping place of public entertainment and holding performances for Public Amusement to possess a

performance licence in accordance with Rule 116 of Rules for Licensing and Controlling place of public amusement, 1960. This has been done by amending Rule 21.

13. In our view, the petitioner cannot question the legality and validity of the Rules including the amended provisions. They have been incorporated in public interest. Authorities under statutes like Bombay Police Act, 1951 are empowered to issue such orders as are necessary for maintaining standards of safety, health, decency and morality at places of public entertainment and amusement. It is clear that when members of public are visiting premises such as hotels and restaurants, the activities therein have to be regulated in public interest. Activities such as Musical and Dance performance should not cross limits of decency and morality. The rules have been framed keeping in view this object. The authorities were, therefore, right in insisting upon a proper licence. In the absence of such comprehensive provisions and Rules it will be difficult to regulate such public places of entertainment and amusement,

which are used for both purposes

14. It is not disputed by Shri Singh nor can it be disputed that once Rule 21 has been amended, then applicability of Rule 116 of 1960 Rules cannot be disputed. Rule 116 has been very widely worded and admittedly includes dance on recorded music. Once Rule 116 applies with its full rigour after amendment to Rule 21 of 1953 Rules, then obviously petitioner is obliged to have a licence contemplated therein. Upon failure of the petitioner in obtaining it, he is liable for consequences provided in law. Petitioner cannot blame the authorities or question their actions on the ground that in a Eating house dominant activity being providing food and drink, he is not obliged to hold performance licence for any ancilliary activity thereat. The distinction between Dominant and Ancilliary Activity at places of the nature maintained and possessed by the petitioner is now obliterated. Once it is so obliterated, then mandate of the Rules must be followed by the petitioner.

15. The decision of the Supreme Court construing provisions of Karnataka Police Act and the Licensing order made thereunder turns upon the basic aspect that is absence of regulatory provisions in respect of public entertainment. The Supreme Court was making distinction between place of public amusement and place of public enertainment because Karnataka Act made it and did not contemplate any control order insofar as place of Public Entertainment. The decision of the Supreme Court naturally, therefore, proceeds on the basis that in the absence of any regulatory measures, the controlling order in case of public amusement would not apply to place of public entertainment. The Supreme court was not considering a issue where incorporation of provision like Rule 21 would obliterate a distinction of the aforesaid nature or not. This is obvious from the following:-

> " A place to which the public are admitted and where any kind of food and drinks are supplied for consumption in the premises would undoubtedly come within the expression "place of public

entertainment" and in the case in hand the restaurant and the bar in question would come within the aforesaid definition of "place of public entertainment. The very fact that "the place of public amusement" has been defined to mean any place where music, singing, dancing or gaming is provided and to that place public are admitted emphasises that the place in question before attracting the definition must essentially be used for either providing music, singing, dancing or gaming and to such premises, the public would be admitted. The later part of the definition clause in Section 2(14) by including certain other clauses of premises makes the definition, no doubt, more extensive, but that by no stretch of imagination, would bring within its sweep where a premises is essentially a place of public entertainment and in that premises some music is provided for. In the case in hand, the restaurant and bar is a place to which public are admitted

and food and drinks are supplied for consumption in the premises. Merely because a live band is also provided it would not assume the character of "public amusement" within the ambit of Section 2(15). The Licensing Order also unequivocally is an order for controlling places of public amusement. Though section 31 of the Police Act confers power on the authority to issue licensing and controlling orders both in respect of "Place of Public amusement" and ’place of public entertainment", but in the case in hand the order has been made only in respect of "public amusement". That being the position, in interpreting any provision of the licensing order, the legislative intention grafted in making distinction between the two terminologies also shall have to be borne in mind.

" In view of the aforesaid conclusion of ours, we are of the considered opinion that the appellants’ premises which is "a place of public

> entertainment" cannot be held to be also a place of public amusement" merely because a live band is also provided in the place of entertainment where food and drinks are served and consequently the provisions of the licensing order will have no application to such premises. The impugned judgement of the Division Bench of the High Court is set aside and these appeals are accordingly allowed."

15. With respect, this decision cannot have any application to the issue at hand. Here specific Rules have been framed. The Rule obliges obtaining of a performance licence when places of Public Entertainment have activities of amusement. It appears that precisely to do away with such a position that the rules are amended, so that under any garb or excuse the real intention behind the rules is not violated.

16. In the result, writ petition fails. Rule is discharged. No orders as to costs. Interim order stands vacated.

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